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Supreme Court of the United States

OCTOBER 1936 TERM.

No. 667.

ANNISTON MANUFACTURING COMPANY, a corporation,

Petitioner,

—against—

HARWELL G. DAVIS, Collector of Internal Revenue,

Respondent.

BRIEF FILED BY THE UNDERSIGNED AS AMICUS CURIAE IN SUPPORT OF APPEAL.

BENNETT E. SIEGELSTEIN,
As Amicus Curiae.

INDEX.

PAGE

POINT I—Title VII of the Revenue Act of 1936 is as vague, uncertain and indefinite as its predecessor, Section 21(d) (1) of the Agricultural Adjustment Act of August 24, 1935, in that it attempts to deprive the taxpayer of an adequate remedy at law.. 1

TABLE OF CASES CITED:

A. P. W. Paper Co. v. *Riley*, 12 Fed. Supp. 738..... 3

Baltic Mills Co. v. *Bitgood*, 12 Fed. Supp. 132..... 3

Danahey Packing Co. v. *McGowan*, 12 Fed. Supp. 457. 3, 4

Edwin Cigar Co. v. *Higgins*, 14 Fed. Supp. 817..... 1

Gold Medal Foods Inc. v. *Landy*, 12 Fed. Supp. 406.. 3, 4

G. B. R. Smith Milling Co. v. *Thomas*, 14 Fed. Supp. 833 ..... 3, 5

John A. Gebelein Inc. v. *Milbourne*, 12 Fed. Supp. 105. 3

Marshall Field & Co. v. *United States, Treasury Decisions*, volume 70, No. 26, issued December 24th, 1936, decision No. 48722, pages 93-115..... 6

Rickert Rice Mills Inc. v. *Fontenot*, 297 U. S. 110.... 3

Shenandoah Milling Co. v. *Early* (District Court, Western District of Virginia, decided September 23, 1935, opinion by Paul, *D. J.*) 4, 5

United States of America v. *Butler*, 297 U. S. 1..... 3

Wilkes Barre Lace Mfg. Co. v. *Maudy*, 13 Fed. Supp. 870 4

OTHER AUTHORITIES CITED:

PAGE

Agricultural Adjustment Act of August 24th, 1935:

Section 21(d) (1) 1, 2, 3, 4, 5

Revenue Act of 1936:

Title VII 1, 2, 6
Section 901 2

Title 26 U. S. C. A. (Revised Statutes, Section 3226):

Section 156 6

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—against—

HARWELL G. DAVIS, Collector of Internal Revenue,
Respondent.

BRIEF FILED BY THE UNDERSIGNED AS AMICUS CURIAE IN SUPPORT OF APPEAL.

As *amicus curiae*, the undersigned urges that the judgment of the court below ought to be reversed and contends:

POINT I.

Title VII of the Revenue Act of 1936 is as vague, uncertain and indefinite as its predecessor, Section 21(d) (1) of the Agricultural Adjustment Act of August 24, 1935, in that it attempts to deprive the taxpayer of an adequate remedy at law.

Recognizing the vulnerability of Section 21(d) (1) of the Agricultural Adjustment Act of August 24th, 1935, and the futility of attempting to enforce its provisions after the decision in *Edwin Cigar Co.* v. *Higgins*, 14 Fed. Supp. 817, declaring said section to be unconstitutional, the law-makers created a substitute by enacting Title VII of the Revenue Act of

1936. By this latest enactment, said Section 21(d)(1) was repealed (see Section 901, 1936 Revenue Act). Title VII of said Revenue Act is a similar endeavor to erect a barrier to the recovery (as in Section 21(d)(1) A. A. A.) of * * * "any tax * * * which accrued *before, on or after the date of the adoption of this amendment* * * *." (Italics ours.)

We contend that Title VII of said Revenue Act, relating to the refund of taxes collected under the A. A. A. is as unconstitutional as the provisions of its predecessors, for it likewise—

1. Attempts to place a restraint on the bringing of an action at law to recover taxes illegally assessed and collected;

2. Attempts to summarily withdraw and deprive taxpayers of adequate remedies at law afforded to them by statutes which have been in effect for seventy (70) years past;

3. Attempts to prevent taxpayers from freely applying to the courts for redress;

4. Attempts to force taxpayers to resort to burdensome, technical, indefinite and inadequate proceedings of a prejudicial character in place of a simple action at law;

5. Attempts to force taxpayers to apply for relief to an administrative officer and if aggrieved by his decision to a Board in the same department as the Commissioner, which may act just as summarily, arbitrarily and with as much possible bias as the Commissioner would;

6. Attempts to deprive taxpayers of their inherent right to litigate their claims for refund in the

form of a judicial proceeding *before an impartial judge and disinterested jury;*

7. Attempts to place taxpayers in a position which would leave them shorn of a remedy at law which the Federal Courts have for many years uniformly held to be available to an aggrieved party, under circumstances as are outlined in the complaint;

8. Attempts to manouever taxpayers into a position which can only result in improper determination, inadequate results and the suffering of definite damages without restitution;

9. Attempts to defeat the purposes of well recognized principles of law.

Numerous decisions upholding the argument here advanced, have been written in the lower courts stamping Section 21(d) (1) with disapproval, namely:

United States of America v. *Butler,* 297 U. S. 1;
Rickert Rice Mills Inc. v. *Fontenot,* 297 U. S. 110;
Danahey Packing Co. v. *McGowan,* 12 Fed. Supp. 457;
Gold Medal Foods Inc. v. *Landy,* 12 Fed. Supp. 406;
Baltic Mills Co. v. *Bitgood,* 12 Fed. Supp. 132;
G. B. R. Smith Milling Co. v. *Thomas,* 11 Fed. Supp. 833;
John A. Gebelein Inc. v. *Milbourne,* 12 Fed. Supp. 105;
A. P. W. Paper Co. v. *Riley,* 12 Fed. Supp. 738;

Shenandoah Milling Co. v. *Early* (District Court, Western District of Virginia, decided September 23, 1935, opinion by Paul, *D. J.*);

Wilkes Barre Lace Mfg. Co. v. *Mundy*, 13 Fed. Supp. 870.

In *Danahey Packing Co.* v. *McGowan, supra*, Judge Knight said of Section 21(d) (1) at page 458:

> "* * * *It seems to me that there is grave question whether the restrictions in this amendment do not violate the property rights of these plaintiffs.* At the least, it must be said that any reasonable interpretation of the procedure sought to be laid down by this amendment is so vague and indefinite as to leave uncertain the remedy obtainable." (Italics ours.)

In *Gold Medal Foods Inc.* v. *Landy, supra*, Judges Molyneaux, Nordbye and Joyce in part said of said Section, at page 411:

> "*It is reasonable to believe that Congress in passing Section 21(a) presumed that every taxpayer was afforded an adequate and complete remedy at law.* The history of our tax legislation justified the conclusion that Section 21(a) is bottomed on that assumption. *The taxpayer's right to have the legality of a tax and his right to refund determined in a court of law has always been recognized as inviolate. It is repugnant to one's sense of justice and fairness that a taxpayer should be required to pay a tax, which he in good faith urges is unconstitutional, and then by reason of legislation, be prevented from obtaining a determination as to its constitutionality.*" (Italics ours.)

In *G. B. R. Smith Milling Co.* v. *Thomas, supra,* Judge Atwell in commenting on Section 21(d) (1) said in part at page 835:

> "This amendment seeks to give the taxpayer who may think himself wronged an opportunity to task for a refund of that which he thinks has been illegally exacted, before the Commissioner of Internal Revenue. But it does not stop by merely giving such a remedy in so many wholesome words, but proceeds to define what that hearing shall include, and the result thereof. It may be that the 'road to salvation is narrow' but, likewise, it is well marked and there is no doubt about it; but if this 'remedy' is well marked and beyond doubt, the court has been unable to discover it. *It is clouded in a number of words and phrases, and impediments, and I think, one would be rather bold to call it a plain, adequate, complete remedy.*" (Italics ours.)

Further in said opinion at page 836, Judge Atwell said:

> "As I said, during argument, we do have suits where a transcript of the proceedings before an executive department may be filed in the court which finally hears the controversy and it has certain probative force and weight, but it is never free from attack; nor from being overcome by other evidence, or other witnesses, that may be offered at the trial by the respective litigants. *In other words, we cannot have a trial any way, except the orderly, legal way that is known as the American way in an American court.*" (Italics ours.)

In *Shenandoah Milling Co.* v. *Early, supra,* Judge Paul in a portion of his opinion (apparently not reported) disapproving of Section 21(d) (1) said:

> "*I do not agree with the view that an adequate*

> *remedy exists.* I need not go into the questions of the power given to the Commissioner of Revenue and the deprivation of the right of a jury trial, *but the remedy provided in the amended act is no remedy at all. The conditions imposed are practically impossible to perform and I suppose Congress in a large measure realized that.*" (Italics ours.)

Surely, the right to sue for the recovery of illegal taxes is clearly defined by Section 156 of Title 26 U. S. C. A. (Revised Statutes, Section 3226) and by complying with its provisions, a taxpayer heretofore for many years was clothed with a definite right to sue at law in the District Court on such a cause of action. That privilege may not in our humble opinion be barred by the present Legislation, which apparently was hastily devised to circumvent this time honored remedy.

Only recently (on December 16th, 1936) the U. S. Customs Court, Second Division, in the case of *Marshall Field & Co.* v. *United States, Treasury Decisions, volume 70, No. 26, issued December 24th, 1936, decision No. 48722, pages 93-115,* held that Title VII of the Revenue Act of 1936 is unconstitutional. Judge Kincheloe, writing the prevailing opinion for the court, said at page 102:

> "We have considered said Revenue Act of 1936, and especially Title VII of same, carefully and studiously, and all the briefs filed by the attorneys on both sides in this case. After a thorough deliberation *we are of the opinion that there is no legal difference between Section 21(d) supra, of the agricultural act of August 24, 1935, and Title VII of the Revenue Act of June 22, 1936. Both undertake to amend an unconstitutional act and the same act. Said Title VII sim-*

ply provides, in our judgment, for a somewhat different procedure but for the same purpose. If, as the Supreme Court says in the *Rice Mills* case, *supra,* that the changes made in the said amended agricultural act of August 24, 1935, 'do not cure the infirmities of the original act' and 'the exaction still lacks the quality of a true tax', and that 'It remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress', then, by the same reasoning, does not said Title VII of the tax act seek in principle to do the same thing? We think so. *Therefore, in our judgment, it does not cure the infirmities of the original act and this exaction still lacks the quality of a true tax, and remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress.*" (Italics ours.)

And at page 104 in said opinion, the court said:

"We therefore hold that the whole of said Title VII is unconstitutional, null, and void because, first, *it does not cure the infirmities of the original Agricultural Adjustment Act,* which was the basis of the decision in the *Butler* case, *supra;* second, because said Title VII of said tax act does 'not affect the rights of the' plaintiff herein; *third, because said Title VII is an effort to effectuate a proceeding under a law already held unconstitutional, and affords plaintiff no adequate remedy at law; fourth, it violates the Fifth Amendment to the Constitution of the United States in that, in our judgment, it deprives this plaintiff of his property* (the compensating tax the subject of this controversy), *without due process* of law; and fifth, that *it does not and cannot ratify or confirm an unconstitutional act of Congress* * * *." (Italics ours.)

In a concurring opinion in that case, Judge Dallinger said at page 114:

> "Therefore, while it is true as a general proposition that there is no vested right in a particular mode of procedure, and that each Congress may establish a different one (*Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557; *Campbell* v. *Iron-Silver Min. Co.*, 83 Fed. 643), nevertheless, *where the Government, as in the instant case, has collected import duties under an unconstitutional and void statute, and a suit to recover the same has been commenced by the plaintiff in good faith in a court specially established by law for the trial of such cases, the taking away by a subsequent act of Congress—in this case by the Revenue Act of 1936—of such judicial remedy, and the substitution therefor of an inadequate remedy at law for the recovery of the duty thus illegally exacted, is a repudiation of an implied contract on the part of the Government to refund moneys unlawfully collected, and does deprive the plaintiff of a vested right without due process of law. Such subsequent legislation, in this case Title VII of the Revenue Act of 1936, is therefore unconstitutional and void.* (Citing cases) * * *." (Italics ours.)

We therefore join in the prayer that the decree of affirmance of the Court below should be reversed.

Respectfully submitted,

BENNETT E. SIEGELSTEIN,
As Amicus Curiae.

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In the Supreme Court of the United States

OCTOBER TERM, 1936.

ANNISTON MANUFACTURING COMPANY

v.

HARWELL G. DAVIS,
Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FILED BY MALCOLM DONALD AS AMICUS CURIAE ON BEHALF OF PACIFIC MILLS

MALCOLM DONALD,
Amicus Curiae.

EDWARD E. ELDER,

HERRICK, SMITH, DONALD & FARLEY,
Boston, Massachusetts,
Of counsel.

CONTENTS

	PAGE
Petition for Leave to File Brief as Amicus Curiae	1

BRIEF

Preliminary Statement	3
Summary of Argument	4
I. The issue to be discussed is whether the destruction of the personal liability of public officers was within the power of Congress as applied to collectors of internal revenue	13
II. The destruction of the personal liability of a public officer, as applied to a Collector of Internal Revenue in the case of an unconstitutional exaction in the guise of a tax, is not within the power of Congress	18
A. Not comprised within the power delegated to Congress to collect taxes	18
B. Is repugnant to the due process clause of Fifth Amendment	21
(1) Because it is outside the scope of Federal power	21
(2) Because it is violation of the fundamental principle of right and justice that there should be a remedy for every wrong	22
(3) Importance should be attached in case unconstitutional taxation to the historical background of the Fifth Amendment	26
C. Because it effectuates an unlawful invasion of the reserved powers of States	27

PAGE

III. The consequences of permitting the destruction of personal liability of public officers would be to permit the confiscation of private rights in property in the whole field of power wherein the sovereign, through its officers, is brought into conflict with the public 29

IV. A person injured by the enforcement of an unconstitutional statute is not bound to rely on the legislative body maintaining in good faith a remedy against the sovereign 38

V. The doctrine of the personal liability of public officers is fundamental in our system of constitutional jurisprudence, and essential to the efficacy of constitutional guarantees of security in property 44

VI. Danger to private rights is also inherent in the doctrine of "apparent validity" favored by the Court of Appeals 50

VII. The destruction of the personal liability of Federal public officers would restrict judicial review to a field defined by Congress and thus imperil the integrity of our constitutional system 53

CITATIONS.

CASES.

	PAGE
American School of Magnetic Healing v. *McAnnulty*, 187 U.S. 94	35
Atchison &c. Ry. Co. v. *O'Connor*, 223 U.S. 280	51
Ayers, In re, 123 U.S. 443	39
Belknap v. *Schild*, 161 U.S. 10	39
Bend v. *Hoyt*, 13 Peters 263	33
Briggs v. *Light-Boats*, 11 Allen, 157	40n.
Brown v. *Huger*, 21 How., 305	34, 47
Bull v. *United States*, 295 U.S. 247, 260	7
Burrill v. *Locomobile Co.*, 258 U.S. 34, 39	23
Buttfield v. *Stranahan*, 192 U.S. 470	20
Cary v. *Curtis*, 3 How., 236, 245	20
Chicago &c. Railway Co. v. *Wellmann*, 143 U.S. 399, 344, 345	55
Chicago, Indianapolis & Louisville Railway Co. v. *Hackett*, 228 U.S. 559, 566	50
Chisholm v. *Georgia*, 2 Dall., 419	40n, 41
Christian v. *Atlantic & N. C. R.R.*, 133 U.S. 233	39
Cunningham v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446	39
Cunningham et als. v. *Monroe, Administrator*, 15 Gray 471	51
Dennison Manufacturing Co. v. *Wright*, 156 Ga. 789	51
Elliott v. *Swartwout*, 10 Peters 137, 154	6, 33
Evans v. *Gore*, 253 U.S. 245, 251-2	54
First National Bank of Sturgis v. *Watkins*, 21 Mich. 483	51
Fong Yue Ting v. *United States*, 149 U.S. 698, 714-715	21
Frick v. *Pennsylvania*, 268 U.S. 473, 488	6
Gelston v. *Hoyt*, 3 Wheat. 246	33
Gibbons v. *Ogden*, 9 Wheat. 1, 191	20
Goltra v. *Weeks*, 271 U.S. 536	35
Greene v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499	35
Grisar v. *McDowell*, 6 Wall., 363	34, 47
Grosjean v. *American Press Co.*, 297 U.S. 233, 250	55
Gross v. *Rice*, 71 Maine 241	52

	PAGE
Hagood v. *Southern*, 117 U.S. 52	39
Harrison v. *St. L. & San Francisco R.R.*, 232 U.S. 318	36
Hopkins v. *Clemson College*, 221 U.S. 636, 642-4	6
Hurtado v. *California*, 110 U.S. 516, 535	22
Johnson v. *Lankford*, 245 U.S. 541	35
Kawananakoa v. *Polyblank*, 205 U.S. 349, 353	40n.
Little v. *Barreme*, 2 Cranch, 170	33
Louisiana v. *Jumel*, 107 U.S. 711	38, 42
Lynch v. *United States*, 292 U.S. 571, 581	7, 13
Marbury v. *Madison*, 1 Cranch, 137, 163, 164-165	25, 44
Meigs v. *McClung's Lessee*, 9 Cranch, 11	34, 47
Minnesota v. *Hitchcock*, 185 U.S. 373	39
Mostyn v. *Fabrigas*, Cowper, 161	33
Noble v. *Union River Logging Railroad*, 147 U.S. 165	35
Norton v. *Shelby County*, 118 U.S. 425, 442	6, 50
Oceanic Navigation Co. v. *Stranahan*, 214 U.S. 320	21
O'Donoghue v. *United States*, 289 U.S. 516, 533-4	55
Osborn v. *Bank of United States*, 9 Wheat. 738	34
Payne v. *Central Pacific Railway Co.*, 255 U.S. 228	35
Pennoyer v. *McConnaughy*, 140 U.S. 1	35
People v. *State Treasurer*, 23 Mich. 499, 502	6
Philadelphia Co. v. *Stimson*, 223 U.S. 605	35
Poindexter v. *Greenhow*, 114 U.S. 270, 288-290, 291	34, 47
Prout v. *Starr*, 188 U.S. 537	34
Reagan v. *Farmers' Loan & Trust Co.*, 154 U.S. 362	34
Rickert Rice Mills v. *Fontenot*, 297 U.S. 110, 113	6
Slocum v. *Mayberry*, 2 Wheat. 1	34
Smyth v. *Ames*, 169 U.S. 466	34
State of Colorado v. *Toll*, 268 U.S. 228	36
State of Maine v. *Poulin*, 105 Me. 224	51
Teal v. *Felton*, 12 How. 284	33
The Abby Dodge, 223 U.S. 166	20
Tracy v. *Swartwout*, 10 Peters, 80, 98-99	6, 33
Truax v. *Corrigan*, 257 U.S. 312, 328-329-330	22

PAGE

United States v. *Butler*, 297 U.S. 1 5
United States v. *Lee*, 106 U.S. 196, 220, 221 . . 10, 12, 34, 40n., 45, 47
United States v. *Marigold*, 9 How. 560, 566 20

Western Union Telegraph Co. v. *Andrews*, 216 U.S. 165 . . 35
Wilcox v. *Jackson*, 13 Peters, 498 ..... 34, 47
Wise v. *Withers*, 3 Cranch 331-337 33

Young, Ex parte, 209 U.S. 123 34

WORKS.

BLACKSTONE, *Commentaries*, Vol. III, pp. 23, 109, quoted in *Marbury* v. *Madison*, 1 Cranch, 137, 163 25
"Centinel," Letters, Printed in McMaster & Stone, *Pennsylvania and the Federal Constitution*, p. 610 27
Federalist, No. 81, Ford's Edition, p. 545 41
FREUND, *Administrative Powers over Persons and Property*, p. 248 33
HALL, *Customs Revenue*, Vol. 2, p. 42 32
MARTIN, LUTHER; Printed in Farrand, *Records of the Federal Convention*, Vol. III, pp. 151, 159 27
MOTT, *Due Process of Law*, pp. 142, 136 24
WARREN, *Supreme Court in United States History*
Vol. 1, page 99 42
Vol. 3, pp. 385, 386 42
Vol. 3, pp. 395, 396 45
Vol. 3, p. 388 47
WILSON, WOODROW, *Constitutional Government of the United States*, pp. 17, 142 54

CONSTITUTIONS AND STATUTES.

Agricultural Adjustment Act 6
Constitution of the United States,
Fifth Amendment 8, 10, 22, 45
Tenth Amendment 27
Eleventh Amendment 41
Fourteenth Amendment 22
Explanatory Act of 1845, 5 Stat. 727 21
Massachusetts Declaration of Rights, Art. XI 25
Revised Statutes, sec. 3224 19

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file this brief as *amicus curiae* in the above-entitled suit.

Your petitioner asks to file said brief on behalf of Pacific Mills, a corporation organized under the laws of the Commonwealth of Massachusetts, which is engaged in the processing of cotton on an extensive scale. It has paid, under protest, to the Government a very large sum of money as processing taxes, with respect to which it has filed petitions for refund.